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February 18, 2005

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

**Re: IP-Enabled Services, WC Docket No. 04-36;
Level 3 Petition for Forbearance, WC Docket No. 03-266**

Dear Ms. Dortch:

On behalf of WilTel Communications, LLC ("WilTel"), Adam Kupetsky of WilTel and I made an *ex parte* presentation regarding the proceedings listed above to Daniel Gonzalez, senior legal advisor to Commissioner Martin. We discussed the points summarized on the attached handout.

If you have any questions, please contact me.

Respectfully submitted,



David L. Sieradzki
Counsel for WilTel Communications, LLC

Enclosure

cc: Daniel Gonzalez

WiTel White Paper on Non-Discriminatory Termination Of VoIP-Originated Traffic on the Public Switched Network

Summary: The FCC must act now to ensure non-discriminatory use of the PSTN to terminate VoIP calls. LECs should tariff their rates for PSTN termination service for VoIP, and those rates should be available to every VoIP provider.

- The Commission’s failure to establish clear rules for such PSTN termination is chilling and distorting development of VoIP services.
- * VoIP providers have no certainty as to one of their largest costs, termination to the PSTN. Many are slowing their rollout of new services because they cannot know their cost structure and do not want to face potentially enormous retroactive liability.

1. The PSTN Termination Market Power Problem: VoIP providers need universal termination to every PSTN customer.

- Every LEC (whether an ILEC or CLEC) has market power over VoIP service terminations to its own end user customer base.
- If the LEC chooses to charge a high termination rate, or to discriminate among VoIP providers, it has the market power to do so.
- Negotiation is not a solution in this narrow but critical area. A VoIP provider needs universal termination to each and every LEC. The VoIP provider has no leverage because it cannot tell its customers that it will not terminate to certain LECs.
- Current merger activity dramatically raises the stakes. Two LECs may agree on how they will terminate their VoIP traffic to each other’s PSTN customers. But they have no incentive to give the same terms to other VoIP providers who do not want to be in the local exchange business, or cannot be in that business on a broad scale.

2. Current Chaos and Discrimination: Discriminatory treatment of different VoIP providers already is distorting the marketplace for this rapidly growing service.

- Some parties are engaging in “self help.” In other cases, certain ILECs have agreed to give certain preferred CLECs special compensation arrangements for VoIP termination that are unavailable to other VoIP providers.
- Some VoIP providers pay standard access charges, while others pay much lower, “local” reciprocal compensation rates to the same LECs to terminate identical VoIP traffic to the same PSTN end users.
- The rates a VoIP provider pays often depend on what *other* non-VoIP services the entity provides. This makes no sense and violates the Act.

- In particular, VoIP providers must not be forced to enter a separate, unrelated business (e.g., local exchange PSTN services).
- 3. LEC Tariffs for VoIP Termination Service:** The Commission should require all LECs to tariff the rates and material conditions under which they terminate VoIP traffic of others to their PSTN customers.
- LEC non-discrimination rules advance VoIP *without regulation of VoIP itself*.
 - * This solution applies regardless of whether VoIP service itself is classified as information service or telecommunications.
 - * By eliminating discrimination in the LEC-provided PSTN termination service, the Commission will free the VoIP market to develop broadly, efficiently, competitively, and without rate regulation.
 - The Commission can establish interim rules for LEC termination of VoIP now, pending further action when *Intercarrier Compensation* reform is completed.
 - * Option: Use proxy rates. VoIP termination rates could be equal to the LEC’s interstate access charges or best reciprocal compensation rate, or a fixed percentage between.
 - * Option: Set an interim rate for all LECs. This could be the same as the rate set for termination of ISP-bound traffic. The Commission even could “zero rate” this traffic pending further consideration of bill and keep.
 - * Different interim rates could apply in rural markets, if desired.
 - Most critical, however, to advance rapid and competitive VoIP deployment, the interim rate level is less important than that LECs charge all VoIP providers the same to terminate VoIP calls to the LECs’ customers.
- 4. Statutory Duty:** The FCC has legal authority -- and an obligation under the Act -- to implement tariffs to ensure non-discriminatory VoIP termination.
- The FCC has held that VoIP traffic falls into a new, unique regulatory category, rather than any of the old categories into which telecommunications services have traditionally been divided, and that such traffic is subject to the FCC’s exclusive jurisdiction.
 - Tariffs in this narrow zone are necessary to address the market power inherent in LEC control over access to their PSTN customers.
 - The Commission has a statutory obligation under the Act to prevent abuse of that market power.
 - LECs’ termination of traffic to end-users on the PSTN is “telecommunications service” (common carriage) (regardless of the classification of the retail VoIP service offering).

5. **Non-Discrimination Principles for VoIP Termination:** The Commission should ensure that a LEC's VoIP termination rate is available to all VoIP providers.
- A VoIP provider should not be required to also become a CLEC and enter into interconnection agreements. Nor should a VoIP provider have to offer non-VoIP long distance services.
 - All VoIP providers should be treated the same with regard to the routing of VoIP and non-VoIP service to the LEC for PSTN termination. No discrimination based on delivery over interconnection trunks and Feature Groups.
 - All broadband-originated VoIP should pay the same termination rates, whether or not it is carried end-to-end by the same provider.
 - * The Commission should order VoIP providers, LECs and IXC's to develop signaling protocols to identify broadband VoIP traffic. The use of an SS7 parameter to distinguish VoIP traffic from other types of calls is technically feasible -- industry standards bodies are already working on it.
 - * Meanwhile, the Commission must mandate interim measures to identify VoIP traffic while signaling protocols are being developed, with auditing/verification procedures.

6. **Relevance to Level 3 Petition: The Need for Tariffs**

- Level 3's forbearance petition, as filed, would approve more favorable treatment to VoIP providers that also provide unrelated CLEC services, as compared with VoIP providers that do not also provide CLEC services.
- WilTel's approach avoids the discriminatory and anti-competitive consequences of relying on interconnection agreements.
- Establishing tariffed termination arrangements for VoIP-PSTN termination would make the Level 3 forbearance petition unnecessary.
 - * However, if desired the Commission could adopt both the Level 3 forbearance petition and the WilTel solution -- so long as the tariffed rates for terminating VoIP traffic to the PSTN match the most favorable rates available in filed interconnection agreements.

